Written Statement of Alberto C. Lamorena, III
Presiding Judge
Superior Court of Guam
Committee on Resources
U.S. House Representatives
Regarding
H.R. 521
Washington D.C.
May 8, 2002

The Organic Act of Guam constitutes a fifty-two year old federal statutory policy promulgated and sustained by every Congress for the last five decades. It is predicated on the principle that the U.S. citizens of Guam should be self-governing in the administration of their local civil affairs to the greatest extent possible, consistent with the current political status of Guam as an unincorporated territory.

Under the Organic Act, Congress has implemented a policy of democratic institution building, enabling Guam to develop the customs and capacity for internal self-government. The principal purpose of the Organic Act has been to promote local responsibility for local affairs, and to prepare the people of Guam for the time when Guam adopts a local constitution and addresses the question of its future political status.

Within the framework of the Organic Act, Congress has tended to legislate on local matters otherwise governed by the Organic Act only to the extent necessary to bring Guam within national law and policy, or under extraordinary circumstances. Congress wisely has exercised sparingly its power to legislate solutions to local problems.

As a general rule Congress has shown prudential restraint and declined to intervene, even when requested by parties to the local political debate and deliberative process unhappy with the results or outcome of the internal mechanisms of self-government under the Organic Act. Although the U.S. citizens of Guam do not live in a state of the union and under the protection of the 10th Amendment to the federal constitution, the Organic Act and the manner in which Congress has implemented it are consistent with the principle of reservation of local power and responsibility over local issues.

This is particularly true with respect to the provisions of the Organic Act which govern the role of the federal and local judiciary in Guam. Subchapter IV of the Organic Act, comprising the provisions codified at 48 U.S.C. 1424, et seq., is a carefully prescribed scheme of judicial empowerment which respects the principles of separation of powers and checks and balances that

are the pillars of American constitutional democracy.

In addition to establishing and defining the jurisdiction of the federal court in Guam, these provisions governing the judiciary prescribe the relationship between the federal and local courts. In doing so, Congress clearly, unambiguously and explicitly identified what matters of judicial administration involved federal interest, and what matters of judicial administration were to be locally determined and regulated.

Thus, Section 1424-1 states clearly that the organization and operation of the local courts shall be as prescribed by the laws of Guam. Nevertheless, Section 1424-2 also recognizes the unique circumstances surrounding the authorization by Congress for establishment under local law of an appellate court. In this provision Congress addressed in exceedingly precise and exact terms the manner in which federal interests would be preserved and protected during the transition in relations between the local and federal courts necessitated by the establishment of the appellate court in Guam.

Section 1424-2 is an artfully drawn statutory scheme that fully, adequately and effectively regulates relations between the newly established Supreme Court of Guam and the federal courts. As such, it is dispositive with respect to federal interest arising from the establishment of the local appellate court. There is no failure to anticipate additional federal policy matters, no errors or omissions in the legislative language. Rather, Section 1424-2 carefully preserves local authority over local courts, respecting what can be referred to as a bright line between federal and local law concerning operation and administration of federal and local courts, respectively.

The best proof of this is the report that the Judicial Council of the Ninth Circuit submitted to Congress in 2001 as required by Section 1424-2. That report states that the decisions of the Guam Supreme Court are of comparable quality to decisions of the highest courts of the states in the Ninth Circuit, and "…do not compel additional appellate review beyond that provided for decisions of the state supreme courts." This finding by the Judicial Council pursuant to its mandate under Section 1424-2 sets the stage for review of decisions of the Guam Supreme Court by the U.S. Supreme Court.

This means the transition in relations between the local and federal courts is going very well, that federal interests at stake in the transitional process, as defined by Congress, are being preserved and protected. Under any reasonable and rational standard, this represents a successful statutory policy to ensure that the exercise by Guam of its authority to establish the Guam Supreme Court would be managed properly to continue good order in relations between the local and federal courts.

Instead of a reasonable standard, H.R. 521 implicitly declares the Congressional policy embodied in Section 1424-2 a failure. It is an assault on the carefully prescribed scheme determined by Congress for the very purposes of protecting federal interests without intruding upon local authority over local courts. H.R. 521 is an attempt to enlarge and expand the scope and extent of federal interests and the exercise of federal powers to encompass and include matters already determined by Congress to be local.

H.R. 521 proceeds form the false premise that the Supreme Court of Guam should operate in

a political vacuum. Under this bill, on the issue of defining its own powers and role in the lives of the community it was created to serve, the Supreme Court will answer only to a Congress in which the U.S. citizens of Guam have no voting representation.

Even though the Guam Supreme Court is a local court created under local law, H.R. 521 proposes to isolate and insulate the Guam Supreme Court from the political and legal processes of the Organic Act, the very instrumentality through which the will of the citizenry and the consent of the governed are redeemed as to all local institutions and civil affairs.

Again, the best proof that this in not warranted, that it is an invasion of already limited local self-government, is the report of the Judicial Council of the Ninth Circuit. For if the manner in which local law governs and regulates the administration and operation of the local courts is so defective, so deficient and so disruptive to good order as the supporters of H.R. 521 claim, then how is that the Ninth Circuit has found that the Supreme Court is functioning in a manner which fully vindicates federal interests as defined by Congress in Section 1424-2?

If the independence of the Guam Supreme Court were being usurped, if the new court were institutionally dysfunctional, then perhaps federal interests beyond those identified in Section 1424-2 might need to be addressed by further legislation. Similarly, if local political debate, legislative proceedings, as well as executive measures, were producing a crisis in the administration of justice in Guam for which there were no local remedy, then perhaps there would be a more compelling reason for this Committee to be considering this bill.

But the local political process under the Organic Act is the mechanism Congress created to address the subject matter of H.R. 521. The fact that it may take time for that democratic process to play itself out is not a reason for Congress to return Guam to an earlier stage in the evolution of self-government by imposing a federal solution. Indeed, resolving this issue locally, debating its merits, is part of the process through which Guam is preparing itself for eventual constitutional self-government and political status resolution.

H.R. 521 is an assault therefore, on democratic self-government and progress toward political status resolution through self-determination. The fact that local legislation addressing these local issues has been swept up in litigation having nothing to do with the subject matter of H.R. 521 is irrelevant. So the real question before us is whether there is a legitimate and compelling federal interest that is being put at risk because Guam law, not federal law, governs the operation and administration of the local courts?

The record before this Committee and Congress on this matter was complete after the hearing held in 1997 on H.R. 2370. The primary difference between circumstances at that time and the present is that the Ninth Circuit has confirmed that the Guam Supreme Court is ahead of the schedule many observers may have predicted in becoming the fully functional local high court of Guam that we all have envisioned for so many years.

The fact that the Ninth Circuit Judicial Council or other national or state organizations may have opinions about local court administration is well and good. However, under Section 1424-2, Congress did not empower the Ninth Circuit Judicial Council or any other organization to exercise an official responsibility in this matter. Rather, Congress defined the central role of the Ninth

Circuit Judicial Council to reporting its findings on certain matters concerning relations between the local and federal courts.

In contrast, under Section 1424-1, Congress vested in the U.S. citizens of Guam and their elected representatives the subject of relations between and among the local courts. That is good policy today, just as it was when this Committee declined to approve H.R. 2370 after the hearing conducted on October 29, 1997.

In my testimony at that time I pointed out that throughout U.S. history Congress has left the formation of the internal organizational structure of local court systems to the local political process in the states and the territories. These are issues that properly are determined under state and territorial constitutions or statutes.

My previous testimony also emphasized the irony if Congressional authorization of a local appellate court became the pretext for Congress to take back the authority over local court organization it granted to Guam under the Organic Act. What have we gained if we are empowered to establish a local appellate court, only to be disempowered as to the operation and administration of the entire local court system itself?

The U.S. Supreme Court has recognized that the power to establish internal structure of local courts is at the heart of local self-government. In the case of Calder v. Bull (1798), it was noted that “Establishing of courts of justice, the appointment of judges, and the making of regulations for the administration of justice, within each state, according to its laws, on all subjects not entrusted to the federal government, appears to me to be the peculiar and exclusive province and duty, of the state legislature”.

The fact that Guam is a territory and not a state is not a reason, or an excuse, to federalize the administration of local courts. The mere fact that there is a robust debate in the local political process over how the local courts should be organized at this juncture in Guam’s history is not an intrusion on judicial functions. Differences of philosophy among members of the Judicial Council of Guam do not threaten the independence of the judiciary.

The claim we have heard about the present local law being a threat to the independence of the judiciary is not a responsible way to frame this discussion. The law-making process through which the local community organizes its courts is political, but that does not invade the adjudicative function. The Guam Legislature has a duty to organize the local courts as it deems best, and doing so is no more an interference with the courts than the process for confirming judges.

Indeed, H.R. 521 is the real threat to the independence of the local judiciary. For in creating the Supreme Court the Guam Legislature reaffirmed the existence of the Judicial Council, a policy-making body since 1950. As in many other court jurisdictions in the United States, the administration of the court system is delegated to the Judicial Council. On Guam, the Council is made up of Representatives from the Supreme Court, the Superior Court, the Attorney General, and the Chairperson of the Legislature’s Committee on Judiciary.

Similarly, in California, a judicial council made up of members of different courts, the state

legislature, and the community oversees the administration of courts, setting policies for a court system that handles one of the largest caseloads in the nation. Somehow the independence of that judiciary has not been usurped.

Likewise, in Utah and in the District of Columbia (also under Congressional control without 10th Amendment protection) a judicial council model is in place. I am told that in D.C. the trial and appeals courts are managed separately by the council.

On Guam the justices and judges are appointed by the Governor and confirmed by the legislature. We believe that the Superior Court is best able to determine what is necessary and proper in order to carry out the court's responsibilities. The Superior Court should be responsible for hiring, promoting, assigning and managing its own personnel, as well as preparing its own budget requests.

That is why the judges of the Superior Court and the Guam Legislature support the judicial council model. It creates a check and balance between the trial court with a caseload 400 times larger than the appeals court, and precludes control of the trial courts by a Supreme Court that does not understand or have to live with resource management challenges of the trial court.

In closing, I would like to return to the first point I made, which is that the Organic Act did not give control of the local judiciary to the local government by accident, or unintentionally. U.S. Senate report 2109 from the Committee on Interior and Insular Affairs described the charter for local self-government as follows: "This bill is reported in the belief that the time has come for the Congress to pass an organic act permitting the people of Guam to govern themselves. It establishes democratic local government for the island and guarantees human freedom under the authority of Congress,…a bill of rights is provided, a representative local government in the American tradition, an independent judiciary administering a system of law based on local needs and traditions, all within the American framework of fundamental fairness and equality…"

Attached to this testimony is the response of the Superior Court of Guam regarding the report of the Ninth Circuit Judicial Council on the Supreme Court of Guam pursuant to 48 U.S.C. 1424-2. This document was transmitted to the Chairman of this Committee on November 30, 2001.

Thank you for the opportunity to submit this written testimony in opposition to H.R. 521.

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SUPERIOR COURT OF GUAM
COMMENTS AND ANALYSIS
REGARDING
THE REPORT OF THE PACIFIC ISLANDS COMMITTEE
JUDICAL COUNCIL OF THE NINTH CIRCUIT
PREPARED PURSUANT TO
TITLE 48, SECTION 1424-2, UNITED STATES CODE

On April 13, 2001, the Presiding Judge of the Superior Court of Guam was notified by the Chairman of the Pacific Islands Committee of the Judicial Council of the Ninth Circuit that its Report on the Supreme Court of Guam has been approved by the Council and transmitted to Congress in accordance with Title 48, section 1424-2 of the United States Code.

It is historic that the Council states at page 24 in Part IX that opinions of the Supreme Court of Guam are of sufficient quality that, "...they do not compel additional appellate review beyond that provided for decisions of state supreme courts." This recognizes that decisions by the territorial supreme court are "comparable" to decisions by the highest courts of other states in the Ninth Circuit, and sets the stage for direct review by the Supreme Court of the United States from final decisions of the Supreme Court of Guam.

It also is significant that Paragraph 8 in Part IX of the report calls upon the U.S. Congress to consider

early termination of certiorari review by the Court of Appeals for the Ninth Circuit. This would accelerate state-like treatment for decisions by the local supreme court, as a judicial body operating under the laws of Guam.

The findings and conclusions referred to above, based on the quality of judicial decisions by the local supreme court, are matters clearly within the cognizance of the Council given its task of reporting to Congress as charged under Title 48, section 1424-2 of the United States Code. The Committee also comments on issues relating to judicial administration of local courts other than the Supreme Court. Within the framework of applicable federal law, these matters involving administration of other local courts clearly remain within the cognizance of the legislative, executive and judicial branches of the local territorial government.

Unfortunately, the Council's comments on local court administration go beyond assessment of the quality of decisions rendered by the Supreme Court. Instead, the Council has entered into the matter of local court administration even though it is an issue of local self-government under the Organic Act, and notwithstanding the deference of Congress to the local political process on this very matter.

For example, Part V of the Committee's report contains a discussion of the relationship between the Supreme Court of Guam and the other two branches of the local government, followed by the discussion in Part VI regarding relations with the Superior Court of Guam. Understandably given the actual purpose and scope of the report, these parts of the Committee's discussion describe some but not all of the legal and political nuances of the difficult history of efforts to establish a local supreme court in Guam.

While the discussion of local court administration policy in the report is insightful, regrettably both the nuances and insights in earlier parts of the report are lost in the summarization contained in Paragraph 7 of Part IX. Without duplicating here views previously presented in the already extensive record regarding local judicial administration now before the local and federal courts, as well as the political branches of the both the local and federal governments, there are a few observations that should be made regarding Paragraph 7, which appears at page 26 of the Committee's report as follows:

> "7. An inordinate amount of time and effort is being expended on many fronts in attempting to resolve the issue of judicial administration of the Guam courts. Certainly, the perception, and perhaps the reality, is that judicial administration in Guam has become politicized. This situation has not helped the institution of the Supreme Court grow as it should. The judiciary should consider examining alternative models with shared responsibility which can begin on a very limited basis and grow over a period of time as the judges and justices desire."

A cursory reading of the Paragraph 7 might lead anyone not well informed about the evolution of local and federal law concerning the administration of courts in Guam to conclusions that contradict those actual findings of the Council that are directly relevant to its mandate under Title 48, section 1424-2. Specifically, Paragraph 7 could lead many readers to believe the Committee found that local politics relating to court administration are encumbering the development, in the words of the Council's mandate from Congress, "...of institutional traditions to justify direct review by the Supreme Court of the United States…" from decisions by the Supreme Court of Guam.

To avoid this misreading of Paragraph 7, it is important to recognize that the Council has found the

Supreme Court of Guam to be functioning well enough for its rulings to receive state-like treatment even earlier than Congress has provided in the federal statute defining the Council's role and the scope of the report. While it may be true as stated in the vague terms of Paragraph 7 that the debate over its relations with other local courts may not have "helped" the Supreme Court of Guam to develop its institutional traditions, that is not what the Council was asked by Congress to address.

Rather, consistent with its actual mandate from Congress the Council's report concludes that decisions of the Supreme Court of Guam are sufficiently "comparable to opinions of the supreme courts of the states in Ninth Circuit" that Congress should consider authorizing direct review of the territorial court's decisions by the U.S. Supreme Court." The clear result is that the debate over local court administration policy has not prevented the Supreme Court of Guam from developing the institutional traditions Congress necessary to its qualification for state-like treatment in the federal judiciary appellate process.

In this context, it would have been more accurate if Paragraph 7 had noted that the Supreme Court is functioning as intended by Congress notwithstanding the debates which have taken place in the local legislative process regarding administration of courts in Guam. The fact that there is a debate over local policy on court administration, as a matter that Congress has vested in the political branches of the local government, does not mean that the orderly administration of justice has been "politicized" in a manner or to an extent that it has interfered with the ability of the Supreme Court of Guam to develop and define its role in the local legal and political process.

While it may be true that officials in all three branches of the local government have staked out differing positions on judicial administration issues, and, as we invariably find when comparable issues arise at the federal level, the political parties tend to support the official policy positions staked out by officials who represent their party interests in the political arena. That is the essential nature of self-government and rule of law in an ordered but also pluralistic political system.

There is no way the Supreme Court of Guam can or should operate in a political vacuum free of a legitimate policy debate over its operations in the political branches of the local government. As long as the independence of the judiciary in performing its judicial duties and role in the governmental system is not undermined, policy regarding court administration is a legitimate subject of legislative deliberations.

The fact that a political process has ensued and resulted in the current policy under local law with respect to administration of other local courts, at the same time the Supreme Court of Guam has been organizing and developing its jurisprudence, is entirely logical and fitting. This is especially true considering that the Superior Court of Guam has been functioning effectively for decades while the federal political and judicial branches wrangled over the parameters for establishing the local Supreme Court in the first place.

That long and twisted history of the local high court's establishment was far more "politicized" in Congress, as well as the local legislature, than the more recent debate over its relationship with the local Superior Court of Guam. The political debate in at the federal level has been the principle challenge faced in instituting the local Supreme Court, and in its development of institution traditions required for state-like treatment.

As to how "politicized" the local system for court administration has become, the Committee's report as approved by the Council notes that the Republican controlled legislature and the Superior Court bench

have been supportive of the development of the institutional traditions of the Supreme Court of Guam in accordance with applicable federal and local laws
establishing the court. In addition, at Part VIII, page 22, the Council's report notes that in the Council's meetings with Superior Court judges, "There was unanimous rejection of the idea of eliminating the Supreme Court."

In Part V at page 17, the report states that, "In meeting with the Senate Judiciary Committee…the Subcommittee observed no indication that legislation might be introduced to eliminate the Supreme Court. Indeed, there appears to be general agreement that on issues
of law, the Supreme Court is supreme." Thus, as to matters of substance and primacy of the local supreme court on matters of law, the local system of self-government is not politicized in a way that is impeding the court's progress.

Those unhappy with current local law and policy regarding judicial administration assert that budget execution and information system management. This is not a compelling reason for local political brinkmanship over court administration, much less Congressional intervention.

Unless the Legislature of Guam alters current law, the proposals to end decades of continuity in court operations in Guam in favor a of new order probably would better be the subject of deliberations and debate in the context of Guam's quest for a greater degree of self-government. For example, at such time as a constitutional convention is convened to replace the Organic Act structure for self-government with a commonwealth structure under a locally adopted constitution, the framers of a new charter for local self-government presumably would want to address the question of whether the existing court system should be preserved, modified or reorganized.

Thus, in the absence of local legislature action, the course most consistent with current federal policy is to leave the present court system as it is, until a local constitution is adopted. This is especially true since Congress authorized state-like self-government under a locally adopted constitution under the terms of P.L. 95-584 two decades ago. It is through formulation of a local constitution that the reconciliation of competing institutional legacies in the structure of local self-government, including elimination of anomalies in structure of all three branches of the local government under the Organic Act, can be accomplished in a democratic and deliberative process.

That is why on June 17, 1998, the Chairman of the House Resources Committee, one of the two committees of jurisdiction over this matter to which the Council must submit its report under Title 48, section 1424-2 of the United States Code, made the following statement in opposition to H.R. 2370, Delegate Underwood's proposed legislation to preclude local
self-determination in Guam of policies for administration of Guam's local courts:

> "...currently there is no compelling federal reason for Congress to regulate the administrative operations of Guam's courts in order to promote federal interests. Indeed, the greater federal interest at this time is to promote local self-determination and self-government over Guam's internal affairs. Guam already has the tools of self- determination which augment the Organic Act and empower the residents of the territory to reform the local judiciary though adoption of a local constitution. Under Public Law
> 95-584, a constitution could establish the Commonwealth of Guam and enable the United States citizens of Guam and an internally self-governing body politic to exercise self-determination in local

> affairs..." Letter from Don Young, Chairman, Committee on Resources, U.S. House of Representatives, to Mark Charfauros, 24th Guam Legislature.

The argument against employing the P.L. 95-548 procedure for reform of the local government structure, used over the years by those who misconceived the process of self-determination for Guam under U.S. and international law, was that adoption of a local constitution would be used as an excuse by Congress to defer further self-determination
on the ultimate status of Guam.

In this regard, it should be noted that October 13, 1998, the U.S. House of Representatives adopted House Resolution 494, expressly stating that, "Congress has continued to enact measures to address the various aspirations of the people of Guam, while considering
legislative approaches to advance self-government without precluding Guam's further right to self-determination." In explaining the resolution to the House before it was adopted, Resources Committee Chairman Don Young made the following statement on the floor of the House that is now part of the legislative history of resolution 494:

> "Today, while the people of Guam continue their quest for increased self-government within the United States community, they can be assured that the adoption of a constitution as authorized by Congress will not prejudice or preclude their right of self-determination and the fundamental right to seek a change in their political status in the future."

The significance of the preceding discussion of Guam's local court structure is plain. The question of local court administration has been "politicized" by those who do not accept the outcome of the local process of self-government and want Congress to intervene to unilaterally alter the court system under the Organic Act, and thereby preempt determination of the future court system under a locally adopted constitution.

This would ignore that fact that Congress has authorized adoption of a local constitution that would resolve all organic issues that the existing governing system under the Organic Act has not addressed. Whether adoption of a local constitution would confirm or reform the current system of judicial administration would then be determined democratically.

If Congress is going to do anything more than it has already done by declining to intervene in this matter under the Organic Act, and by authorizing a local constitution, it should perhaps continue to sustain a policy of continuity in local court structure until a locally adopted constitution becomes the vehicle for a more permanent determination of this issue.

Thus, the Committee's report, as now adopted by the Council, is directly on point in concluding, as noted above, that there is no issue of politicization of the process for development by the Supreme Court of Guam of institutional traditions to justify state-like treatment of the court's rulings. That was, after all, the subject on which the Council was directed by Congress to report, and as the report states regarding the politicized debate among local political factions
in Part V, at page 18, "…the division is over administrative control."

The Committee's report as adopted by the Council then goes on to discuss the three options for resolving the question of court administration:

§ Allow the judicial administration system established through the local political process to continue;

§ Amend the Organic Act to transfer effective control over administration of all courts to the Supreme Court of Guam;

§ Establish a consultative process through which the justices and judges of the Supreme Court of Guam and the Superior Court agree on arrangements to share administrative functions in order to create a blended system of judicial administration, integrating operations where possible and preserving separate administration where necessary.

While neither illogical nor without precedent as a model for court administration, the "third path" of partial integration faces one very serious and possibly fatal obstacle. For it contradicts the one element of Paragraph 7 with which all concerned with this entire matter must agree:

> "An inordinate amount of time and effort is being expended on many fronts in attempting to resolve the issue of judicial administration of the Guam courts."

By every standard of measurement, the cost of the effort to end continuity and impose a new order through highly politicized initiatives has been too high. The ability to work toward local consensus has been undermined by the attempt of those unwilling to accept the outcome of local self-government to orchestrate the imposition of a result through high profile political tactics not normally associated with the issue of judicial administration.

To avoid a situation in which the performance of Guam's courts may be impaired by expenditure of time and effort addressing proposals for change of the current system of court administration, perhaps the best course for now is to operate as effectively as possible under the existing system. That may have to do until a consultative process can be established free of controversial proposals and high-pressure tactics.